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SUPREME COURT, U.S.

CASE NO. 81-5970

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JESSIE JOSEPH TAFERO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT WAS REQUIRED BY THE EIGHTH AMENDMENT TO CONDUCT AN INQUIRY INTO THE PETITIONER'S DECISION NOT TO PRESENT EVIDENCE IN MITIGATION IN THE PENALTY PHASE OF HIS TRIAL?

II.

WHETHER THE TRIAL COURT UNCONSTITUTIONALLY LIMITED CONSIDERATION OF THE MITIGATING FACTORS?

III.

WHETHER UNDER THE SIXTH AMENDMENT THE TRIAL COURT WAS REQUIRED TO CONDUCT AN INQUIRY INTO THE PETITIONER'S WAIVER OF HIS RIGHT TO SELF REPRESENTATION WHEN HE WAS REPRESENTED BY COUNSEL?

IV.

WHETHER A FEDERAL QUESTION ARISES FROM THE TRIAL COURT'S RULING ALLOWING THE STATE FO CALL A WITNESS WHOSE NAME WAS DISCLOSED TO THE DEFENSE ON THE DAY THE TRIAL COMMENCED?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

STATEMENT OF THE CASE

The Petitioner was convicted in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, of two counts of first degree murder and one count each of robbery and kidnapping. He was sentenced to death for each of the murders, and to prison terms on the other convictions. The Florida Supreme Court, on direct appeal, affirmed both the judgments and sentences. Tafero v. State, 403 So. 2d 355 (Fla. 1981). (Petitioner's Appendix A). The Respondent relies on the account of the facts stated in the Florida Supreme Court's Opinion, Id. at 358 - 359, as its statement of the facts.

ARGUMENT AGAINST GRANTING THE WRIT

I.

THE EIGHTH AMENDMENT DOES NOT REQUIRE A TRIAL JUDGE TO CONDUCT AN INQUIRY AS TO WAIVER WHERE A DEFENDANT DOES NOT PRESENT EVIDENCE OR ARGUMENT IN MITIGATION AT THE PENALTY PHASE OF A CAPITAL SENTENCING PROCEEDING.

The Florida Supreme Court held that there was no error in the trial judge's failure to inquire into the Petitioner's waiving of his right to present evidence at the sentencing phase of the trial, because there was no indication that he did not know or understand this right. The Petitioner, represented by competent counsel, declined to present any evidence at the penalty phase (sentencing transcript, p. 47). This decision was no different than his decision not to present evidence at the guilt/innocence phase of the trial. His attorney's statement to the jury that the Petitioner didn't feel his trial was fair and he did not want to participate in the sentencing argument or to beg for mercy (sentencing transcript, p. 54) evidences that a tactical choice had been made by the Petitioner after consultation with his counsel. The failure of the trial court to inquire into the Petitioner's reasons therefore was never raised at that level,[1] but only on appeal and the Petitioner did not before the State Supreme Court and has not now presented any authority mandating such an inquiry.

The waiver of any presentation of evidence or argument in mitigation is not a waiver of a fundamental right, so the

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(1) See Wainwright v. Sykes, 433 U.S. 72 (1977)

Appellant's attempt to compare the instant case to Boykin v. Alabama, 395 U.S. 238 (1969) is unfounded. In Boykin the Court recognized that a guilty plea waives several federal constitutional rights, including the right against self incrimination, the right to jury trial, and to confrontation and cannot be presumed from a silent record. In capital cases, this Court has held that the Eighth Amendment requires that the capital sentencing system must allow for consideration of mitigating circumstances, i.e., the death penalty can not be mandatory for certain offenses. Woodson v. North Carolina, 428 U.S. 281 (1976). The Florida capital sentencing procedure is constitutional. Proffitt v. Florida, 428 U.S. 242 (1976). The Petitioner did not waive the entire penalty phase of the proceedings and in fact the jury was instructed on the appropriate factors to consider, so the proceeding was conducted in accordance with the statute. Therefore, there was no waiver analogous to the waiver of a jury trial, but merely a choice not to present evidence made by the Petitioner. The trial court was not required to inquire further, and the Petitioner has failed to demonstrate a constitutional question over which this Court should assume jurisdiction.

II.

THE TRIAL JUDGE DID NOT LIMIT CONSIDERATION OF MITIGATING FACTORS.

This Court upheld the Florida Capital sentencing statute and in so doing, specifically noted that the list of mitigating circumstances therein is not exhaustive. Proffitt v. Florida, 428 U.S. 242 (1976); See also, Spinkellink v. Wainwright, 578 F. 2d 582, 620,621 (5th Cir. 1978), cert.

denied, 440 U.S. 976; Songer v. State, 365 So. 2d 969 (Fla. 1978). The Appellant did not present any evidence in mitigation at the trial level and his belated attempt to raise it on appeal and then to argue it wasn't considered by the trial judge or jury is specious. Moreover, there were no objections to the alleged non-consideration of the non-existent mitigating factors at the trial level. Wainwright v. Sykes, supra.

The case of Washington v. Watkins, 655 F. 2d 1346 (5th Cir. 1981), is distinguishable from the instant case, since the faulty charge in Washington v. Watkins, supra, in addition to the possibly confusing parallel syntax, contained additional limiting language:

> If you find that one or more of the preceding elements exists, then you must consider whether it outweighs the aggravating circumstances. . .

There was no similar language used in the charge given in the instant case. Furthermore, the jury, unlike the jury in the cited case, was told the aggravating circumstances, "are limited to" . . . and these words did not reappear in the instructions on mitigating circumstances so there was no parallel syntax to confuse the jury.

Finally, the Appellant argues that the Florida Supreme Court in reversing a co-defendant's death sentence has found non statutory mitigating evidence which could also have been found in this case, citing, Jacobs v. State, 396 So. 2d 713 (Fla. 1981). In Jacobs there was no additional evidence presented at the sentencing phase, but the jury recommended a life sentence, and the Florida Supreme Court found that the jury

had probably considered certain non-statutory mitigating factors. The Court held the jury's recommendation was reasonable and should not have been overridden by the trial judge. These same factors did not exist in the instant case--the Court noted that Jacobs' role was passive and she was under the influence of her lover, the Petitioner--[1] and the jury in this case recommended death.

Therefore, the statute and the jury instructions did not limit consideration of the mitigating factors; there simply were none to consider. The Petitioner has not demonstrated constitutional error.

III.

THE PETITIONER WAS NOT ENTITLED TO "HYBRID" REPRESENTATION; THE TRIAL COURT WAS NOT REQUIRED TO DETERMINE WHETHER THE PETITIONER WAIVED HIS RIGHT TO SELF REPRESENTATION.

The Petitioner's claim that he was prevented from participating fully in his own defense is really a claim of right to act as co-counsel, a "right" that does not exist. State v. Tait, 387 So. 2d 389 (Fla. 1980); United States v. Daniels, 572 F. 2d 535, 540 (5th Cir. 1978); United States v. Bennett, 539 F. 2d 45, 49 (10th Cir. 1976). The Petitioner did not seek to proceed pro se; at all times during the case he accepted the representation by appointed counsel. Under the circumstances, the Petitioner was accorded his constitutional right to representation by counsel and there was no requirement

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(1) See Jacobs v. State, 396 So. 2d at 718.

that the trial court conduct an inquiry into whether the Petitioner waived his right to represent himself, a right that the Petitioner never sought to invoke.

The Respondent's position is supported by the recent decision of Brown v. Wainwright, __ F. 2d __, 5th Cir. Case No. 78-2532 (Op. filed 1/11/82)(en banc). In Brown, the Court held that the defendant's initial request to represent himself had been waived by his subsequent conduct, i.e., accepting appointed counsel's representation, and that a personal dialogue between the court and the defendant was not required. Thus, in the instant case, where there was no clear request to proceed pro se, the Petitioner's rights were protected and this Court need not assume jurisdictionl

IV.

THERE IS NO FEDERAL QUESTION ARISING FROM THE TRIAL COURT'S ALLOWING THE STATE TO CALL A WITNESS WHOSE NAME WAS DISCLOSED ON THE DAY THE TRIAL COMMENCED, FIVE DAYS BEFORE THE WITNESS TESTIFIED.

The Petitioner's claim in the State court was first that he was:

> Denied the due process of law by the trial court's failure to exclude the testimony of Ellis Marlowe Haskew or to grant a continuance to allow time for investigation after a clear violation of the rules of discovery by the State. [Emphasis added] (Appellant's brief, point III).

His primary complaint under this point was that because the prosecutor didn't supply the defense with the witness Haskew's

name until the day the trial commenced, that the Florida discovery rule, Fla.R.Crim.P. 3.220(a)(i), was violated. There is no federal constitutional right to discovery in a criminal case except as to the disclosure of favorable evidence upon demand required by Brady v. Maryland, 373 U.S. 83 (1963). Moore v. Illinois, 408 U.S. 786 (1972); Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Thus, this matter concerned merely a question of State law in which the Petitioner's federal constitutional rights were not implicated.

The Petitioner's second point in regard to Haskew's testimony was that he:

> Was denied due process of law by the State's failure to produce evidence which is materially favorable to the accused. (Appellant's brief, Point IV).

This matter was never raised at the trial court level and furthermore, the Petitioner made no specific request for the evidence he now claims was suppressed, so Brady v. Maryland, supra, is inapplicable. Additionally, in United States v. Diecidue, 448 F. Supp. 1101 (M.D. Fla. 1978), the Court held that the same omitted evidence--the fact that Haskew's attorney was paid by a State agency--would not have affected the verdict and its non disclosure was harmless under the standard of United States v. Agurs, 427 U.S. 97 (1976).

CONCLUSION

WHEREFORE, the Respondent respectfully requests that this Honorable Court DENY the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 18 day of January, 1982, to Honorable Craig S. Barnard, Assistant Public Defender, 224 - Datura Street, 13th Floor, Harvey Building, West Palm Beach, Florida, 33401, by Courier.

Of Counsel